RIFE OIL PROPERTIES, INC.

IBLA 90-374 Decided August 24, 1990

Applications for attorney's fees and expenses under the Equal Access to Justice Act.

Dismissed.

1. Equal Access to Justice Act: Adversary Adjudication--Oil and Gas Leases: Civil Assessments and Penalties

Two applications for attorney's fees and expenses filed with the Board under the Equal Access to Justice Act, 5 U.S.C. § 504 (West Supp. 1990), one for services rendered in connection with an appeal of a BLM decision which was dismissed by the Board as premature, and the other in connection with a BLM decision which was withdrawn by BLM, are both properly denied because no adversary adjudication has occurred and the Office of Hearings and Appeals has not conducted an adjudication.

APPEARANCES: Candace Hamann Callahan, Esq., Santa Fe, New Mexico, for appellant; Arthur Arguedas, Esq., Office of the Field Solicitor, Southwest Region, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

On June 4, 1990, and on June 13, 1990, Rife Oil Properties, Inc. (Rife), filed with the Board separate applications for attorney's fees and expenses under the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C.A. § 504 (West Supp. 1990), and Departmental regulations at 43 CFR 4.601.

By decision dated January 30, 1990, the Deputy State Director, (DSD), New Mexico State Office, Bureau of Land Management (BLM), addressed the propriety of a decision by the Farmington, New Mexico, Area Manager (AM), BLM, denying an application for after-the-fact approval to vent casinghead gas from the No. 1 Jicarilla 126 Well and making an assessment for "avoidably lost gas." The Farmington AM denied the application pursuant to NTL-4A, determining that it would have been economic to have captured the gas since April 1, 1980, the effective date of NTL-4A. In its decision,
the DSD did not affirm the AM's decision, but instead remanded the case for an evaluation of "the economics of installing a gas compression system

at the well * * * using production characteristics as determined by the Farmington Office to be correct" (Jan. 30, 1990, DSD Decision). The DSD instructed the Farmington AM as follows:

> Should the gas compression system prove to be economic, the determination and assessment will be allowed to stand. Should the gas compression system be uneconomic, the Area Manager is to evaluate the deleterious effects that the plunger lift system may have on produceability of the well into the pipeline versus the loss of the gas through venting, then issue a new decision based on that evaluation.

Id. In addition, the DSD mistakenly informed Rife of its right to appeal its decision to this Board.

Rife appealed the DSD's decision to the Board, and by order dated May 13, 1990, the Board dismissed Rife's appeal, ruling that "the DSD's decision did not result in a final disposition of the matter which was adverse to appellant. Rather, the Deputy State Director remanded the matter to the local office of BLM for further review of issues which could yet be determined in appellant's favor" (Order dated May 14, 1990).

The Board noted that "[i]t has been brought to [its] attention that, despite the fact that Rife had filed an appeal of the DSD's remand order, a decision in the matter was rendered on remand by the Farmington AM on April 17, 1990." Id. In this April 17 decision, the Farmington AM "determined that there would be no deleterious effects on the pipeline from installing a plunger lift system on [well No. 1 Jicarilla 126]," and classified the well as a "gas well." Moreover, due to the "manner in which [the gas] has been vented," the Farmington AM classified such vented gas as "avoidably lost." The AM indicated that Rife would receive a notice for payment from the Minerals Management Service (MMS) for "full value on the amount vented from April 1, 1980 through October 21, 1984 (49,033 Mcf) and royalty value on the amount vented thereafter (25,217 Mcf)." The AM informed Rife of its right to request a State Director review of its April 17, 1990, decision.

In its May 14, 1990, order, the Board observed "[t]hat the effect of filing an appeal to the Board is that BLM loses jurisdiction over the case and has no authority to take further dispositive action on the subject matter of the appeal," and that "[i]n recognition of this principle, on May 7, 1990, BLM notified [the Board] that the AM's April 17 decision has been withdrawn." Id.

On June 4, 1990, Rife filed an application for attorney's fees and expenses incurred in connection with the April 17, 1990, Farmington AM decision, and on June 13, 1990, Rife filed an application for attorney's fees and expenses incurred in connection with the DSD's January 30, 1990, decision.

[1] Authorization for the award of fees and expenses is set forth in the EAJA at 5 U.S.C.A. § 504(a)(1) (West Supp. 1990), which provides in part:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make the award unjust. [Emphasis added.]

An "adversary adjudication" is defined at 5 U.S.C.A. § 504(b)(1)(C) (West Supp. 1990) to mean "an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise * * *." (Emphasis added.)

The Department's regulations governing procedures for submission and consideration of applications for fees and expenses under 5 U.S.C.A. § 504(a)(1) (West Supp. 1990) provides:

> These rules apply to adversary adjudications required by statute to be conducted by the Secretary under 5 U.S.C. 554. Specifically, these rules apply to adjudications conducted by the Office of Hearings and Appeals under 5 U.S.C. 554 which are required by statute to be determined on the record after opportunity for an agency hearing. These rules do not apply where adjudications on the record are not required by statute even though hearings are conducted using procedures comparable to those set forth in 5 U.S.C. 554. [Emphasis added.]

43 CFR 4.603(a).

We find that Rife is not an eligible applicant for fees and expenses incurred as a result of its controversy with the Department. There has been no "adversary adjudication" as defined at 5 U.S.C.A. § 504(b)(1)(C) (West Supp. 1990). We agree with the following statement by BLM:

> No statute requires that an Agency make a determination on the record or that it hold a hearing before the Agency can deny an after-the fact application to vent and flare gas from a gas well. No statute requires such a determination or hearing before an Agency State Office can review a Resource Area Office denial of an application to vent and flare. No statute requires a determination on the record or a hearing before IBLA can dismiss an "appeal" as being unripe.

(Answer at 5).

Even if the Board or BLM had granted a discretionary hearing, Rife's claim for attorney's fees and expenses would not be cognizable under 5 U.S.C.A. § 554(a)(1) (West Supp. 1990). By its regulation, quoted

above, "[t]he Department clearly intended to exclude from the coverage of the Act all proceedings except those required by a statute to be conducted under 5 U.S.C. § 554. In re Attorney's Fees Request of DNA--People's Legal Services, Inc., 11 IBIA 285, 90 I.D. 389 (1983)." Kaycee Bentonite Corp., 79 IBLA 182, 186-87, 91 I.D. 138, 141 (1984). See also Benton C. Cavin, 93 IBLA 211 (1986), affirmed Cavin v. United States, 19 Cl. Ct. 198 (1989).

Additional reasons mandate dismissal of Rife's applications for attorney's fees and expenses. As noted, in its May 14, 1990, order, the Board dismissed Rife's appeal of the DSD's January 30, 1990, decision on the basis that the DSD had remanded the matter to the Farmington AM for further review of the issues involved, and that the DSD had improperly indicated to Rife that it could appeal its decision to this Board. The Board further noted that the Farmington AM's decision was a nullity, since Rife had appealed the DSD's decision to the Board, and that "with the issuance of [the Board's] order disposing of the appeal, the AM is now free to proceed" (Order dated May 14, 1990). Thus, BLM correctly maintains that Rife is not a "prevailing party" under 5 U.S.C.A. § 504(a)(1) (West Supp. 1990): "Neither the Agency's remand decision nor IBLA's remand order even begins to grant the only relief sought by Rife: approval of the application to vent and flare and exoneration from any liability for past venting and flaring. Those matters remain open and unresolved" (Answer at 6).

Similarly, Ann Marie Sayers, 115 IBLA 40 (1990), involved an application for attorney's fees and expenses incurred in connection with a case in which there had not been a decision on the merits. At issue in Sayers was an application for attorney's fees and expenses filed by California Indian Legal Services in connection with its representation of Sayers before various California officials of BLM in obtaining approval of Sayers' allotment under the General Allotment Act of 1887, 25 U.S.C. § 334 (1982). The Board stated:

> To date, there has been no adjudication conducted by any component of the Office of Hearings and Appeals, whether by the Hearings Division or by this Board. While it is clear that Sayers did file an appeal to this Board (see 88-83), the Board did not reach the merits of the appeal. Prior to reaching the merits, the Board granted BLM's motion to remand the case so that the agency could issue a proposed decision approving Sayers' allotment. [Emphasis in original.]

115 IBLA at 41. The procedural posture of Rife's application likewise requires its dismissal. 1/

1/ Rife filed a "Request for Assignment to an Administrative Law Judge, for Hearing and Oral Argument." That request is denied. Pursuant to 43 CFR 4.415, the Board may refer a case to an Administrative Law Judge for an evidentiary hearing when material facts are in dispute. There are no facts in dispute in this case; as a matter of law, Rife is not entitled to attorney's fees and expenses.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the applications for attorney's fees and expenses are dismissed.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge